

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 17, 2009

LEROY SEXTON v. STATE OF TENNESSEE

Appeal from the Circuit Court for Fentress County
No. 9493 Shayne Sexton, Judge

No. M2009-01018-CCA-R3-PC - Filed February 24, 2010

Petitioner, Leroy Sexton, was convicted by a Fentress County jury of one count of rape of a child. The trial court sentenced him to twenty-five years. Petitioner's direct appeal to this Court was unsuccessful. *State v. Leroy Sexton*, No. M2004-03076-CCA-R3-CD, 2007 WL 92353 at *1 (Tenn. Crim. App., at Nashville, Jan. 12, 2007). Petitioner subsequently filed a petition for post-conviction relief. The post-conviction court summarily dismissed the petition for being filed outside the statute of limitations and because the issues presented are either waived or previously-determined. After a thorough review of the record, we conclude that Petitioner's issues presented in his petition are indeed waived or previously determined. Therefore, we affirm the post-conviction's dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and CAMILLE R. MCMULLEN, JJ., joined.

Leroy Sexton, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; and William Paul Phillips, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

A Fentress County jury convicted Petitioner of one count of rape of a child. *Leroy Sexton*, 2007 WL 92353 at *1. The trial court sentenced Appellant to twenty-five years. *Id.* On appeal to this Court, Petitioner argued that he was afforded ineffective assistance of

counsel and that the prosecutor made improper statements during closing argument amounting to prosecutorial misconduct. *Id.* at *3, 6. This Court found that trial counsel rendered effective assistance. *Id.* at *5. This Court also concluded that Petitioner had failed to object to the remarks in question at trial and the elements required for review under the plain error doctrine had not been met. *Id.* at *7. Our supreme court denied Petitioner's application for permission to appeal on May 14, 2007.

On November 6, 2008, Petitioner filed his petition for post-conviction relief. Petitioner listed several arguments as the basis of his petition: he was denied a fair and impartial jury; he was afforded ineffective assistance of counsel; he was denied his right to present evidence; the prosecutor failed to preserve evidence potentially favorable to the defense; the prosecutor made many improper statements; the prosecutor was leading a witness; past convictions were used illegally; the evidence was insufficient; key evidence was stolen by his accuser; the judge would not let Petitioner's statement in at trial; the judge denied Petitioner's request to transcribe a tape which included key evidence for the defense; the judge denied him an expert witness; and a catch-all argument including anything else in the motion for new trial. The post-conviction court summarily dismissed the petition because the petition was filed outside of the one-year statute of limitations and because the grounds alleged were previously determined or were waived for failure to be presented for determination in a proceeding in which the grounds could have been presented.

Petitioner appeals the dismissal of his petition.

ANALYSIS

On appeal, Petitioner argues that the post-conviction court erred in summarily dismissing his petition based upon the statute of limitations. Petitioner argues that due process rights should toll the statute. The State argues that the statute of limitations should not be tolled and, in the alternative, that the issues presented have been previously determined.

Under the Post-Conviction Procedure Act, a petition for post-conviction relief must be filed within one year of the date of the final action of the highest state appellate court to which an appeal is taken, or if no appeal is taken, within one year of the date on which the judgment became final. T.C.A. § 40-30-102(a). Unless one of the enumerated exceptions applies, a court does not have jurisdiction to consider an untimely petition. *See* T.C.A. § 40-30-102(b). Tennessee Code Annotated section 40-30-102(b) states:

(b) No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

In the present case, the post-conviction petition was filed more than one year after the date of the final action by the highest court to which an appeal was taken and thus well outside the statute of limitations. The post-conviction court properly held that Petitioner failed to show that one of the exceptions to the one-year deadline listed in the statute was applicable.

In addition to the exception set out in the statute, the courts in this State have found that due process concerns can toll the statute of limitations in certain factual situations. *See Williams v. State*, 44 S.W.3d 464 (Tenn. 2001); *Sands v. State*, 903 S.W.2d 297 (Tenn. 1995); *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992).

The petitioner relies on *Williams v. State*, 44 S.W.3d 464 (Tenn. 2001), to support his argument. *Williams* is the most recent in a line of cases including *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992) and *Sands v. State*, 903 S.W.2d 297 (Tenn. 1995), analyzing when due process limitations toll the statute of limitations. In all three of these cases, our supreme court decided that the statute of limitations for post-conviction relief could be tolled in the factual situations presented. In *Burford*, the petitioner's sentence was being enhanced by previous convictions that had subsequently been declared invalid, but not in time for him to

meet the statute of limitations for filing his post-conviction petition. *Burford*, 845 S.W.2d at 208. Our supreme court stated that because the petitioner was in a procedural trap, the petitioner's due process rights would be violated by not allowing a tolling of the statute of limitations and the filing of a post-conviction petition. *Burford*, 845 S.W.2d at 208-09.

In *Sands*, our supreme court analyzed *Burford* and set out the basic rule derived from *Burford* and how to go about applying this rule in future cases. The supreme court stated:

[I]t will be helpful to summarize the basic rule to be derived from *Burford*: that, in certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar a petitioner's claim when the grounds for relief, whether legal or factual, arise after the "final action of the highest state appellate court to which an appeal is taken" - or, in other words, when the grounds arise after the point at which the limitations period would normally have begun to run. In applying the *Burford* rule to specific factual situations, courts should utilize a three-step process: (1) determine when the limitations period would normally have begun to run; (2) determine whether grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "later-arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. In making this final determination, courts should carefully weigh the petitioner's liberty interest in "collaterally attacking constitutional violations occurring during the convictions process," *Burford*, 845 S.W.2d at 207, against the State's interest in preventing the litigation of "stale and fraudulent claims." *Id.* at 208.

Sands, 903 S.W.2d at 301. However, after going through this analysis, the supreme court concluded that the statute of limitations had not been tolled in the *Sands* situation.

In *Williams v. State*, 44 S.W.3d 464 (Tenn. 2001), the supreme court again held that the statute of limitations was tolled by the factual and legal situation of the petitioner. In *Williams*, there was some dispute over whether the petitioner's trial counsel continued to represent him and how much the petitioner actually knew about the progress of his appeals. The supreme court stated that the question was whether the petitioner had been "misled to believe that [his trial] counsel was continuing the appeals process" *Id.* at 471. The supreme court remanded the case to the trial court for it to determine whether the statute must be tolled due to possible attorney misrepresentation. *Id.*

Petitioner argues that because the post-conviction court did not hold an evidentiary hearing he is unable to present his argument on appeal. Therefore, he requests a remand to the post-conviction court for a hearing.

In a post-conviction proceeding, “[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless” the claim is based upon a newly-recognized constitutional right with retroactive application or the ground was not presented as the result of state action in violation of the federal or state constitution. T.C.A. § 40-30-106(g); *see State v. Benson*, 973 S.W.2d 202, 208 (Tenn. Crim. App. 1998). Under T.C.A. § 40-30-106, the trial court shall enter an order dismissing the petition for post-conviction relief if, inter alia, it appears the ground asserted for relief has been previously determined on the merits by a court of competent jurisdiction. T.C.A. § 40-30-106(h).

However, we need not remand for a determination as to whether due process requires the tolling of the statute of limitations. Even if the statute of limitations were to be tolled the issues presented by Petitioner are waived or previously determined.

As stated above, on direct appeal, this Court addressed whether Petitioner was afforded ineffective assistance of counsel and whether there was prosecutorial misconduct at Petitioner’s trial. *Leroy Sexton*, 2007 WL 92353 at *5. Therefore, Petitioner’s issues regarding ineffective assistance of counsel and prosecutorial misconduct have been previously-determined by a court of competent jurisdiction. *See* T.C.A. § 40-30-106(h). All of Petitioner’s remaining issues: he was denied a fair and impartial jury; he was denied his right to present evidence; his past convictions were used illegally; the evidence was insufficient; key evidence was stolen by his accuser; the judge would not let Petitioner’s statement in at trial; the judge denied Petitioner’s request to transcribe a tape which included key evidence for the defense; the judge denied him an expert witness and a catch-all argument including anything else in the motion for new trial, are all issues which could have been presented in Petitioner’s direct appeal to this Court. The issues presented are neither based upon a newly-recognized right nor failed to be presented because of State action. Therefore, they are waived. *See* T.C.A. § 40-30-106(g).

All issues presented by Petitioner in his petition for post-conviction relief have been waived or previously determined. The post-conviction court was correct in its summary dismissal of the petition.

CONCLUSION

For the foregoing reasons, we affirm the action of the post-conviction court.

JERRY L. SMITH, JUDGE